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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-502

STEPHEN MUSS, et al.,

Appellants,

v.

CITY OF MIAMI BEACH, etc.,

Appellee.

On Appeal from the District Court of Appeal of Florida, Third District

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BRIEF OPPOSING MOTION TO DISMISS

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The City of Miami Beach in its Motion to Dismiss argues that after the decision of this Court in *Nebbia v. New York*, 291 U.S. 502 (1934), there can be virtually no successful due process attack on state (or city) legislation. Put another way, the City's position is that rent control legislation now cannot be successfully challenged—not even on the ground that it is arbitrary, unreasonable, or unrelated to the legislative objective.

Appellants submit that the City of Miami Beach is wrong —state legislation must still pass a basic due process test.

The legislation must not be arbitrary and it must have a substantial, rational relationship to the legislative purpose. This Court certainly made that plain by repeated assertions in *Nebbia*. For example:

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods *consistent with due process*. And the guaranty of due process, as has often been held, demands only that the law *shall not be unreasonable, arbitrary or capricious*, and that the means selected shall have a *real and substantial* relation to the object sought to be attained. 291 U.S. at 525. [Emphasis added.]

Surely affected citizens have some recourse to the courts when faced with arbitrary legislation. Specifically, landlords must have some judicial recourse if arbitrary, irrelevant rent control legislation is adopted. The Miami Beach rent control ordinance *was* arbitrary as to luxury housing and had no justifiable public purpose.

The test of whether or not rent control legislation is arbitrary and irrelevant, not meeting minimal constitutional standards, was articulated by this Court in *Block v. Hirsh*, 256 U.S. 135 (1921), *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924), and *Levy Leasing Co v. Siegel*, 258 U.S. 242 (1922). The test, as stated in *Levy Leasing*, is the existence of "emergency" housing conditions which are injurious to "the health, morality, comfort, and even to the peace of a large part of the people . . . ." 258 U.S. at 245.

Examples are scarcity of housing, overcrowding, rent gouging and unsanitary conditions.[1]

In *Block*, Justice Holmes wrote that the gross housing emergency which then existed was "a publicly notorious and almost worldwide fact" and there was simply no question that "the emergency declared by the statute did exist. . ." 256 U.S. at 154. Subsequently, writing about the same New York rent control act in *Chastleton*, Justice Holmes added, as to the necessity for the existence of a housing emergency:

> We repeat what was stated in *Block v. Hirsh* . . . as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But, even as to them, *a court is not at liberty to shut its eyes to an obvious mistake*, when the validity of the law depends upon the truth of what is declared. 264 U.S. at 547. [Emphasis added.]

There seems to be no doubt that rent control laws are valid, irrespective of their wisdom, when facts of a housing emergency genuinely exist. But, when no such emergency exists and there are no facts to support it, rent control is arbitrary, unreasonable and irrelevant to any public policy. As

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1 This Court has not overruled or limited either *Chastleton*, *Block*, or *Levy Leasing*. Furthermore, in cases decided after *Nebbia*, this Court and others have continued to recognize the presence of such "emergency" conditions as prime elements in the promulgation of rent controls. See *Bowles v. Willingham*, 321 U.S. 503 (1944); *Woods v. Miller*, 333 U.S. 138 (1948); *Kress, Dunlap & Lane, Ltd. v. Downing*, 193 F. Supp. 874 (D.V.I. 1961); *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2nd 801 (Fla. 1972). The assertion in some quarters that *Block*, *Chastleton*, and *Levy Leasing* have been impliedly overruled presents a substantial question worthy of this Court's full consideration.

this Court wrote in *Nebbia*:

> Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty. 291 U.S. at 539.

Rent control based on no supportive factual background does not have a "substantial relation" to public purpose which the *Nebbia* case requires.[2] *Chastleton* and *Levy Leasing* simply set forth the needed public purpose for valid rent control legislation. Thus, they are fully consistent with *Nebbia* and are merely descriptive of the standards set forth therein.

Nebbia and other cases discussed by the City disallow due process challenges because the circumstances in those cases clearly showed a valid public purpose and because there was no evidence that the regulation involved was arbitrary, unreasonable, or unrelated to the legislative objective.[3] *Nebbia* recognizes that "due process" is not a mechanical test, and that the facts and circumstances of each case are relevant to the constitutionality of a law:

> [A] regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts. 291 U.S. at 525.

2 The significance of the *Nebbia* case was that it struck down the wholly artificial concept that only businesses "affected with a public interest," such as railroads and utilities, were subject to valid state regulation absent extraordinary circumstances.

3 For example, in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), the business of "debt-adjusting" had long been subject to abuse and the plaintiff had failed to show the absence of such abuse. *Brotherhood v. Chicago, R. I. & P. R. Co.*, 393 U.S. 129 (1968), dealt with the validity of a railroad safety measure and the Court had consistently recognized the legislative justifications for such measures.

In the instant case, it is uncontroverted that none of the conditions supporting the public purposes and legislative objectives of rent control existed in the luxury housing market on Miami Beach. The wealth of the tenants, their mobility, and the characteristics of the accommodations are entirely inconsistent wih the necessary conditions described in *Chastleton* and *Levy Leasing*. The application of rent controls to the luxury market in Miami Beach bears no substantial relationship to any legitimate public purpose and is patently "arbitrary," "unreasonable," and "demonstrably irrelevant" to the public policy sought to be implemented.

Finally, in recent months this Court has utilized the due process clause to strike down legislation which unreasonably interfered with constitutionally protected rights.[4] In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court held a zoning ordinance in violation of due process, and in *Carey v. Population Services Int'l.*, 431 U.S. 678 (1977), a law prohibiting the sale of contraceptives to minors was likewise invalidated on due process grounds.

4 Unwarranted interference with one's property rights is no less unconstitutional than unwarranted interference with other personal liberties. As stated by this Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972),

> the dichotomy between personal liberties and property rights is a false one. . . . The right to enjoy property without unlawful deprivation . . . is in truth a "personal" right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Justice Powell speaking for the Court in *Moore* quoted Justice Harlan in describing the continuing constitutional protection against arbitrary legislation:

> Due process has not been reduced to any formula . . . . [The] full scope of the liberty guaranteed by the Due Process Clause . . is a rational continuum which, broadly speaking, includes a freedom from all substantial, arbitrary impositions and purposeless restraints . . . . 431 U.S. at 501-02.

The failure of the lower courts to adhere to the requirements of due process—as stated in *Nebbia* and more fully articulated as to rent controls by *Levy Leasing* and *Chastleton*—presents a substantial federal question. This Court should note probable jurisdiction.

Respectfully submitted,

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